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In the

Supreme Court of the United States

LESLIE WAYNE BOWLING, Lt., RUSSELL WHITMAN, Sgt., EDWARD DIEKMAN, Officer,

Petitioners,

v.

LADAWNYA K. CARPENTER, CHARLES N. COMBS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the first prong of qualified immunity is satisfied, in light of the exigent circumstances and community caretaking exceptions to the Fourth Amendment, when police officers enter a private residence, without a warrant, during the officers' enforcement of a domestic violence protection order, in order to secure the safety and protection of a minor child, following the arrest of the minor child's custodial parent for violating the protection order? (*Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943 (2006), extended; *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), extended)

2. In the context of claims of excessive force during an arrest, what is the proper amount of deference that must be given to reasonable police officers on the scene during an emotionally-charged domestic dispute, pursuant to *Saucier v. Katz*, 533 U.S. 194 (2001), when a claimant submits a self-serving affidavit, that is contrary to her deposition testimony, in an attempt to manufacture a question of fact in seeking to overcome summary judgment on the issue of qualified immunity? (*Scott v. Harris*, 127 S.Ct. 1769, 1774-75, 167 L.Ed.2d 686 (2007), applied)

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners **Leslie Wayne Bowling**, **Russell Whitman**, and **Edward Diekman** are police officers for the City of Franklin, Ohio, who were denied qualified immunity in a Section 1983 action alleging an unlawful entry, and the use of excessive force, in violation of the Fourth Amendment.

Respondents

Respondents and siblings, **Charles Combs** ("Combs") and **LaDawnya Carpenter** ("Carpenter"), are plaintiffs in the underlying Section 1983 case. Combs asserts an alleged unlawful entry claim when officers entered his apartment to remove his 10-month-old baby to place him into the custody of his mother; Carpenter makes a claim for an alleged use of excessive force.

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PETITION FOR A WRIT OF CERTIORARI

Russell Whitman, Wayne Bowling, and Edward Diekman petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

The importance of this case reaches far beyond the City of Franklin, Ohio, and its 11,000 residents because the role of police officers nationwide is directly impacted as they act to serve and protect victims of domestic violence and their children.

Combs and his sister Carpenter sued Sergeant Whitman, and Officers Bowling and Diekman for alleged violations of their civil rights because the Officers lawfully enforced a Domestic Violence Protection Order. Sarah Kirby obtained the Order to protect her from further violence at the hand of her 10-month-old baby's father, Combs. The Order set forth when Kirby and Combs were to exchange custody of Tyler at the Franklin Police Department.

Here, the Officers were dispatched to Combs' apartment to respond to Kirby's call for help because Combs had again violated the Order by refusing to relinquish baby Tyler to Kirby. Combs and his many family members gathered at the scene to support Combs' violation of the Order. They offered him their support by threatening Kirby with physical violence. The Officers knew the threats were genuine because they knew Carpenter physically assaulted Kirby about one year earlier. As such, the Officers faced an

emotionally-charged situation at the scene, but never lost sight of their role and took all appropriate steps to enforce all aspects of the Order. This included arresting Combs for violating the Order, and entering Combs' apartment to remove Tyler and place him with his mother, Kirby.

Combs sued the Officers claiming a Fourth Amendment violation when an Officer had to enter his apartment to take custody of the baby. He does not challenge that the seizure of the baby was lawful. This case presents the Court with an opportunity to extend the exigent circumstances exception to warrantless entries to allow for the protection of children when the custodial parent is arrested. Likewise, this Court's review is needed because our nation's courts of appeals do not agree on what constitutes a lawful exercise of the community caretaking function of police officers, as proven by this case. Existing precedent tells us police can enter a house because loud music is coming from it but here, police cannot enter Combs' apartment to take Tyler to his mother in compliance with the Domestic Violence Protection Order.

It is truly an absurd notion that a custodial parent can be arrested outside of his residence but, according to the Sixth Circuit in this case, the police cannot enter the premises, without a warrant, to secure the safety of a ten-month-old baby. This is particularly true in this case, where the lower courts have held that the seizure of the baby was constitutional, but the entry into the apartment to seize the baby may be unconstitutional. This is an issue that cries out for the Court's guidance and review.

Further, the Court should seize this opportunity to reconcile the summary judgment standard with the directives set forth in *Saucier* and *Graham*, which is long overdue. Lower courts are desperately in need of instruction from this Court on how lower courts should properly afford deference to the officers' on-scene perceptions in the face of a self-serving affidavit implicitly used to manufacture a question of fact to defeat an otherwise proper summary judgment motion. When Carpenter's out-of-control behavior spilled into the parking lot where Kirby waited to receive her baby, she forced the Officers to arrest her. Carpenter improperly defeated the Officers' entitlement to qualified immunity on her excessive force claim when she opposed their motion for summary judgment with an affidavit replete with inflammatory words like "slam" and "crush." Review of this case is needed to end the erosion of qualified immunity from suit by claimants who manufacture questions of fact.

OPINIONS BELOW

The Sixth Circuit Court of Appeals decision, *Carpenter v. Bowling*, 276 Fed.Appx. 423 (6th Cir. 2008), was not selected for publication in the Federal Reporter. (1a–11a) The opinions of the district court are also unreported. *Carpenter v. City of Franklin, Ohio*, 2006 WL 3791931 (S.D. Ohio 2006)(16a-51a); *Carpenter v. City of Franklin, Ohio*, 2007 WL 120140 (S.D. Ohio 2007)(12a-15a).

JURISDICTION

The Sixth Circuit Court of Appeals entered judgment on May 2, 2008. The Sixth Circuit Court of

Appeals denied Petitioners' request for a rehearing *en banc* on July 17, 2008. (52a-53a) The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Respondents bring their Fourth Amendment claims under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

1. The Domestic Violence Protection Order (73a-85a) was filed on July 26, 2002, when Kirby, as petitioner, sought protection from Combs, who was listed as the respondent. *Id.* The Order was in place from July 26, 2002 through July 1, 2007. *Id.*

The Order prohibited Combs from abusing Kirby, and also prohibited Combs from having any contact with Kirby, including even coming within 100 yards of Kirby. *Id.*

With respect to custody of Combs and Kirby's infant child, Tyler, the Order directed the child would remain with Combs during the week, and with Kirby on the weekends. *Id.* All exchanges of the child were to take place at the Franklin Police Department. *Id.*

The Order warned Combs multiple times that he could be arrested for violating the Order. *Id.* The Order clearly states that only the Court can change the Order. *Id.*

2. On more than one occasion, before the day in question, Combs violated the Order by refusing to turn Tyler over to Kirby as required by the Order. (87a) By his own admission, Combs was in violation of the Order on August 16, 2002, when he failed to take the child to the Franklin Police Department to give Tyler to his mother, Kirby. (104a)

An examination of Combs' affidavit (103a-108a), as well as Carpenter's affidavit, (142a-147a) reveals that Combs had no intention of complying with the Order when he was arrested on August 16, 2002. As Kirby stated in her affidavit, Kirby had no choice but to turn to the police to get her child from Combs. (87a) While Combs claims the police violated his Fourth Amendment rights by walking into his apartment to collect Tyler after Combs' himself was arrested, he has left unchallenged the lower court decisions holding the seizure of Tyler was lawful. (5a)

3. Kirby turned to the Franklin police to enforce the Order Combs frequently chose to violate so she could obtain custody of her baby. (87a) Kirby told police on the day in question she filed paperwork with

the court to have Combs found in contempt for his violations of the Order. *Id.*

In response to Kirby's call for help, Sergeant Whitman, and Officers Bowling and Diekman were dispatched to Combs' apartment to arrest Combs. (3a) Combs was waiting for the police at his apartment, along with numerous family members, including his sister, Carpenter, his mother, and his new girlfriend, to name a few. *Id.* Kirby, who was not allowed to enter the apartment under the Order, was waiting in the apartment parking lot.

4. The Police arrested Combs outside of Combs' apartment. *Id.* Combs and Carpenter both protested Combs' arrest, and claimed to have temporary custody papers at Carpenter's house that would excuse Combs' violations of the Order. *Id.* The Officers obliged Combs and Carpenter, and even allowed Carpenter to return to her house to look for the "temporary custody papers," and delayed taking Combs to jail. *Id.* When Carpenter returned to Combs' apartment, with no paperwork because none, in fact, existed, the Police next spoke to Combs' attorney, and then called the Warren County Children's Services to take extra care in enforcing the Order. *Id.*

The call with Combs' lawyer, Roger Staton, confirmed that Staton had failed to file any paperwork to request modification of the Order. *Id.* The call to Children's Services confirmed that Kirby had the right to take the child under the Order on that particular day. *Id.* Therefore, to further enforce the Order, Sergeant Whitman took Tyler from the arms of Carpenter, who was at the time in Combs' apartment,

to lawfully place him in the custody and arms of his mother, Kirby, who was in the parking lot. Combs then went to jail. *Id.*

5. It is undisputed in the record that the situation unfolding at Combs' apartment was an emotionally-charged situation for Combs, Carpenter, and their family members. Combs was crying and visibly upset when he was placed under arrest. (265a) Carpenter was visibly upset and very vocal throughout the incident. (265a-266a) Combs' mother was upset, and her use of profanity further ignited the scene. (302a) Sergeant Whitman and Officer Bowling observed Carpenter particularly upset throughout the incident, observed her throwing objects around inside the apartment, and heard her use profanities. (109a-140a)

6. Officer Bowling took Carpenter aside before leaving the apartment, and warned Carpenter that she needed to calm down because she was not helping the situation with her inappropriate behavior. (281a-282a) Carpenter ignored the warning and continued to cry, swear, and act hysterically as she followed the Officers to the parking lot, where Kirby was waiting for her baby Tyler. Next, Carpenter, still crying and upset, yelled to Kirby from across the parking lot "remember, Sunday at six." (296a-297a) Sergeant Whitman and Officer Bowling heard Carpenter finish the sentence by calling Kirby a "bitch." (112a, 132a)

This did not surprise the Officers, considering they knew Carpenter from her past brushes with their department. (109a-140a) Carpenter admitted Officer Bowling knew her and her violent tendencies from her many prior contacts with him arising out of domestic

violence calls involving her ex-husband, herself, and their child, as well as the instance when Carpenter physically assaulted Kirby. (356a; 362a-363a) Officer Bowling, wanting to maintain control over the scene and to protect Kirby and her child then in the parking lot, placed Carpenter under arrest for disorderly conduct and failure to desist. (112a)

7. Carpenter's claim for the alleged use of excessive force relates to her arrest in the parking lot. Officer Bowling described her arrest as follows:

> ...I had placed one handcuff on Carpenter, she began to turn away from me in such a way that I was pushing her against a parked vehicle, and she tried to push away from the parked vehicle. With the assistance of Sergeant Whitman and Officer Diekman, we were able to place the other handcuff onto Carpenter, and Officer Diekman and I were able to place Carpenter into the patrol car.

(112a)

Police practices expert, David Grossi, opined the officers' handcuffing an individual behind the back, and the use of vertical stabilization, such as a van, is standard procedure. He further concluded the force used by these Officers constituted low levels of force and greater levels of force may have been warranted under these circumstances.

Carpenter admitted that she repeatedly protested her arrest, which included raising her voice and struggling with the arresting officers. (316a) She

further admitted that she verbally protested continuously, and tried to get the officers to handcuff her in front. (309a) She further testified that her arrest lasted just "a few seconds." (309a)

Carpenter used hyperbole in her affidavit, describing the arresting officers' actions as "crushing her," and "slamming her." (145a) The Sixth Circuit's decision seized on these words, and concluded that a question of fact existed as to the excessive force claim, and in doing so, ignored Carpenter's deposition testimony on the same subject. In doing so, the court afforded no deference to the Officers' perceptions on the scene and ignored Carpenter's deposition testimony taken after she executed the self-serving affidavit.

8. With regard to removing Tyler from the home, the Sixth Circuit noted that his "seizure" was lawful. The only issue is whether the Officers violated the Fourth Amendment by physically entering Combs' apartment to take the 10-month-old baby out of it. The Sixth Circuit cites no law on this issue which denies Sergeant Whitman, Officer Bowling, and Officer Diekman qualified immunity from suit. The Sixth Circuit does not consider, nor even acknowledge, that the Officers entered the apartment to enforce the Domestic Violence Protection Order. The Sixth Circuit also rejected that the Officers acted in exigent circumstances and in a caretaking capacity when removing Tyler and placing him in the lawful custody of his mother.

REASONS FOR GRANTING THE PETITION

I. The Court should take this opportunity to create an exception to the warrant requirement that permits a warrantless entry into a private residence to secure a minor child following the arrest of the custodial parent and in accordance with the terms of a Domestic Violence Protection Order.

As this Court has recognized, it is a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004). However, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *Flippo v. West Virginia*, 528 U.S. 11, 13, 120 S.Ct. 7, 145 L.Ed.2d 16 (1999) (per curiam); *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). To not reverse here is patently unreasonable.

This Court has set forth a variety of exceptions to the Fourth Amendment, and permitted warrantless entries by police onto private property. Recently, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943 (2006), the Court recounted the following exceptions: **(1)** fighting a fire and investigating its cause (*Michigan v. Tyler*, 436 U.S. 499, 509, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978)); **(2)** preventing the imminent destruction of evidence (*Ker v. California*, 374 U.S. 23, 40, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963)); **(3)** engaging in "hot pursuit" of a fleeing suspect (*United States v. Santana*, 427 U.S. 38, 42-43, 96 S.Ct.

2406, 49 L.Ed.2d 300 (1976)); and (4) rendering emergency assistance to an injured occupant or protecting an occupant from imminent injury (*Mincey v. Arizona*, 437 U.S. 385, 393-394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)).

The principle behind such exceptions to the warrant requirement is to allow police officers to respond to exigent circumstances. As this Court has repeatedly held, "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City*, supra (citing *Mincey*, supra).

Here, the Sixth Circuit, like the district court, acknowledged that the seizure of Tyler, a ten-month-old baby, from his father's apartment, following his father's arrest, was lawful. Nevertheless, the Police are being denied qualified immunity and are being forced to stand trial because they had to enter Combs' apartment to take Tyler to the arms of his mother waiting outside the apartment – all because Combs refused to follow the Order himself.

The time has come for the Court to create an exception to the warrant requirement to allow police officers to enter a private residence, without a warrant, to take custody of a minor child following the arrest of the child's custodial parent or guardian. The Court can accomplish this by either extending the "exigent circumstances" exception to encompass this situation, or by extending the "community caretaking"

exception to the warrant requirement. Or, the Court can place all states on notice through this case that its officers can lawfully enter private premises to enforce the terms governing children in domestic violence protection orders without a warrant so the injustice that has occurred in this case never happens again.

A. This exception is necessary to protect children.

The government has a compelling interest in the welfare of children. *Tower v. Leslie-Brown*, 326 F.3d 290, 297 (1st Cir. 2003). In this case, a baby was being held in an emotionally-charged apartment following the arrest of the baby's father, who had violated a Domestic Violence Protection Order. There is no dispute that the custodial parent, Combs, was arrested by the Officers outside of his apartment. Combs asserts a claim for an alleged unlawful entry against the Officers for entering his apartment after his arrest for the sole purpose of taking the baby to his mother – the only person with lawful custody over the baby at that particular time. Combs admits the seizure of the baby was lawful.

The need to protect or preserve life, or to avoid serious injury, is justification for what would be otherwise considered a violation of the Fourth Amendment. *Brigham City*, supra. States have a profound interest in the welfare of the child, particularly sheltering the child from abuse. *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999). As the Eleventh Circuit noted recently, in *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003), courts have recognized that a state may constitutionally remove

children threatened with imminent harm when it is justified by emergency circumstances. *Kearney*, supra at 1293 (citing *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000); *Tenenbaum*, 193 F.3d at 593-94; *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997); *Jordan by Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994)).

Further, when custodial parents are arrested, and the arrest occurs away from the custodial parents' private residence, courts have permitted police officers to detain, or take into protective custody, the arrestee's children. *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003); *Matheny v. Boatright*, 970 F.Supp. 1039, 1041 (S.D.Ga.1997). The same principle should apply even when the arrest occurs on or near the custodial parents' private residence. And, the fact that non-custodial relatives or significant others to the arrestee are present should be immaterial to the rule of law that needs to be established allowing officers to enter the premises without a warrant to protect the child by enforcing the domestic violence protection order.

This case presents the Court with the opportunity to extend, and make clear, that Fourth Amendment protections are not violated when police officers arrest a minor child's custodial parent or guardian without a warrant, outside the parent or guardian's private residence, and then must enter the premises to take the minor child into protective custody. The Court has an opportunity to solidify the right of police officers to act reasonably in circumstances, as seen here, that are fraught with issues of domestic violence.

No one can deny the vast problem that domestic violence poses for this country. The American Bar Association, on its website,[1] posts numerous disturbing statistics and studies with respect to children and domestic violence, including:

- Slightly more than half of female victims of intimate violence live in households with children under age 12.[2]

- Battered women are not the only victims of abuse - it is estimated that anywhere between 3.3 million and 10 million children witness domestic violence annually. Research demonstrates that exposure to violence can have serious negative effects on children's development.[3]

- Children exposed to Intimate Partner Violence were 1.6 times as likely to score in the borderline to clinical level range on externalizing behaviors relative to children of

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[1] http://www.abanet.org/domviol/statistics.html (Oct. 8, 2008); see also Family Violence Prevention Fund, The Facts on Children and Domestic Violence, (2005), available at http://endabuse.org/resources/facts/Children.pdf (Aug 1, 2005).

[2] Lawrence A. Greenfield et al., U.S. Dep't of Just., NCJ 167237, Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouse, Boyfriends, and Girlfriends (1998) available at www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf).

[3] Sharmila Lawrence, National Center for Children in Poverty, Domestic Violence and Welfare Policy: Research Findings That Can Inform Policies on Marriage and Child Well-Being 5 (2002).

> similar age and sex (as measured on three scales of internalizing behaviors, externalizing behaviors, and social competence according to the standardized psychometric instrument of Achenbach's Child Behavior Checklist, or CBCL).[4]

No one, not even Combs and Kirby, can seriously argue that police officers should not be permitted to take an infant child into protective custody when the infant's custodial parent is arrested. If Combs had been arrested walking on a public sidewalk, the police would not have left 10-month-old Tyler on the sidewalk to fend for himself. There is no practical reason to distinguish a sidewalk arrest from the arrest in this case. The police could not have verbally commanded 10-month-old Tyler to walk out of his father's apartment so that he could be turned over to his mother, in compliance with the Domestic Violence Protective Order.

The Sixth Circuit's decision in this case denies qualified immunity for police officers to enter into a private residence to secure the safety of a minor child following the arrest of the child's custodial parent. This ruling is made despite the Sixth Circuit's holding that the police officers' "seizure" of Tyler was lawful. If the officers are expected to obtain a search warrant in order to lawfully enter the apartment to secure Tyler before turning him over to his mother, in

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[4] Mary A. Kernic et al., Behavioral Problems Among Children Whose Mothers are Abused by an Intimate Partner, 27 Child Abuse & Neglect 1231 at 1239 (2003).

compliance with the Domestic Violence Protection Order, who is supposed to provide for his safety in the meantime? This decision, if allowed to stand, unreasonably and unnecessarily places children in danger. Additionally, it wrongly empowers respondents to domestic violence protective orders, especially respondents like Combs, who choose to repeatedly violate such protective orders.

B. This appellate court decision creates conflicts within the Sixth Circuit and, between the Sixth Circuit and the First, Fifth, Eighth and Tenth Circuits, which must be settled regarding the application of a police officer's "community caretaking" function.

This Court created a "community caretaking" exception to the Fourth Amendment, reasoning as follows:

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Cady v. Dombrowski, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973).

The Northern District of Ohio recently recounted the application and extension of the "community caretaking" exception among the Circuits as follows:

> ...the caretaking function ***has extended to warrantless entry into private premises***, usually in response to manifestations of criminal conduct. See, e.g., *United States v. Johnson*, 9 F.3d 506, 510 (6th Cir. 1993) (officers observed broken window and individuals inside residence while responding to burglary report); *United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990) (occupant had become belligerent and was threatening others, including children).
>
> The Sixth Circuit also ***has approved warrantless entry in response to excessively loud music coming from a residence***, where the officers' efforts to alert residents to their presence had been unsuccessful. *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996) ("by entering Defendant's residence for the limited purpose of locating and abating a nuisance, the officers sought to restore the neighbors' peaceful enjoyment of their homes and neighborhood.").
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> * * *
>
> [C]ourts have applied the caretaking exception ...: i.e., where officers have acted to protect an individual from endangering himself or others. See *Gallegos v. City of Colorado Springs*, 114 F.3d 1024, 1029 (10th Cir. 1997) (officers

> responded to reports of a suspicious person or prowler in the neighborhood and about a drunken individual quarreling with a woman; "[t]his was not a case of police officers arbitrarily stopping an individual [on] the sidewalk during the middle of the afternoon"); *United States v. Rideau*, 949 F.2d 718, 720 (5th Cir. 1991), vacated on other grounds, 969 F.2d 1572 (5th Cir. 1992) (en banc) (agreeing with panel on this point) (officers stopped defendant for his own safety and the safety of others after observing him standing in the middle of the road at night, dressed in dark clothes, and apparently intoxicated); *United States v. Wallace*, 889 F.2d 580, 582 (5th Cir. 1989) (officers detained defendant for his own safety after being informed that he possessed gun and had threatened suicide); *United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978) (where the circumstances justified a reasonable fear of a drowning, officers could board an abandoned vessel to determine its ownership and protect safety of its mariners); *United States v. Nord*, 586 F.2d 1288 (8th Cir. 1978) (officers entered defendant's apartment on being summoned there by a third person, who told officers that he was concerned because defendant was intoxicated).

Jacobs v. Village of Ottawa Hills, 111 F.Supp.2d 904 (N.D.Ohio 2000)(emphasis added).

Like the Sixth Circuit, the Third Circuit also has allowed police officers to enter a private residence, without a warrant, in response to loud music coming

from a residence. *Noone v. City of Ocean City*, 60 Fed.Appx. 904 (3rd Cir. 2003).

The Third Circuit has also created a "knock and talk" exception to the warrant requirement. *Estate of Smith v. Marasco*, 430 F.3d 140 (3rd Cir. 2005). In *Marasco*, police were responding to a complaint by a private citizen that a neighbor was shining a porch light onto his property. *Id.* The Third Circuit held that "entry into the curtilage after not receiving an answer at the front door might be reasonable as entry into the curtilage may provide the only practicable way of attempting to contact the resident." *Id.* at 157.

If the "community caretaking" exception to the warrant requirement permits a warrantless entry onto private property in response to ***excessively loud music*** coming from the property, ***or a neighbor shining a light into another neighbor's backyard***, it begs the question as to how this exception would not apply to ***removing an infant child from a private residence following the arrest of the child's custodial parent***.

This case affords the Court with an opportunity to revisit the "community caretaking" exception to the Fourth Amendment, which has existed since 1973, and clarify its application to situations such as the one at issue in this case. The research and studies prove the fact pattern here repeats itself, sadly, countless times a day in our country. The decision in this case proves the circuit courts are in need of guidance on this issue. Absent a reversal of the appellate court decision here, it can even be said that a conflict is now created as to how the community caretaking exception is applied

within the Sixth Circuit and between the Sixth Circuit and the First, Fifth, Eighth and Tenth Circuits.

This Court must take review of this case because now, on one hand, the exception allows police officers to enter a private residence without a warrant to tell the occupants to turn their music down, but on the other hand, police officers cannot enter a residence without a warrant to take a baby into protective custody following the arrest of the custodial parent who is in violation of a domestic violence protective order.

Common sense is not meant to defy the application of the Fourth Amendment. The Fourth Amendment reasonableness standard does not forbid providing for the safety of children in our country when their guardians are taken to jail. The law should not permit civil rights suits to be filed against police officers enforcing domestic violence protective orders when they are lawfully carrying out their duties to protect domestic violence victims and their children.

If the Court extends either the "exigent circumstances" or the "community caretaking" exceptions to encompass this situation, then the officers are entitled to qualified immunity because they did not violate Combs' Fourth Amendment rights. The Sixth Circuit also erred in not granting the Officers summary judgment on their qualified immunity defense because there is no clearly established law on this issue. In fact, the Sixth Circuit cited no law whatsoever on this issue in its opinion.

C. By not allowing police officers to enforce a domestic violence protective order by arresting the offender, and taking the offender's minor child into protective custody, courts place police officers in the position of facing the double-edged sword of potential liability for unlawful entry versus potential "snake pit" liability.

The Police Officers here were dispatched to Combs' apartment to enforce a Domestic Violence Protective Order. Specifically, they were dispatched in response to Combs' violation of the provisions regarding custody and visitation of Combs and Kirby's minor child. Combs was again refusing to comply with the provisions of the Order that required him to come to the Franklin Police Department to turn the child over to Kirby's custody each Friday.

The problem of domestic violence in America cannot be ignored. The Ninth Circuit recently recognized this as such, stating "Domestic violence is a serious problem in America. When love turns to hate, grave injury-even death-can result. When that violence spins out of control, considerable problems confront the criminal justice system." *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007).

Statistics and studies confirm the horrific problem that domestic violence presents for this country. Domestic violence protective orders, like the one at issue in this case, have been an important tool in combating the problem of domestic violence. For this reason, the wide-spread impact this case presents to this Court is evident. Victims and the children of

victims of domestic violence need this Court to establish law for all federal courts to heed, holding that action taken by police to enforce domestic violence protective orders will not cause police officers to be exposed to claims of civil liability filed by the abuser.

The staggering statistics and studies posted on the American Bar Association's website[5] on domestic violence, law enforcement, and protective orders, will be positively affected if this case is reviewed and reversed. Those statistics and studies include:

- According to the U.S. Department of Justice, between 1998 and 2002:
    - Of the almost 3.5 million violent crimes committed against family members, 49% of these were crimes against spouses.
    - 84% of spouse abuse victims were females, and 86% of victims of dating partner abuse at were female.
    - Males were 83% of spouse murderers and 75% of dating partner murderers
    - 50% of offenders in state prison for spousal abuse had killed their victims. Wives were more likely than husbands to be killed by their spouses: wives were about half of all spouses in the

[5] http://www.abanet.org/domviol/statistics.html (Oct. 8, 2008).

population in 2002, but 81% of all persons killed by their spouse.[6]

- According to the Department of Justice:
  - Approximately 60% of family violence victimizations were reported to police between 1998 and 2002, up from about half between 1993 and 1998.
  - Fear of reprisal by the perpetrator made up 19% of the reasons females did not report their victimization to the police.[7]
- Reports indicate some 86% of the women who received a protection order state the abuse either stopped or was greatly reduced.[8]

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[6] Citing Matthew R. Durose et al., U.S. Dep't of Just., NCJ 207846, Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances, at 31-32 (2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf.

[7] Citing Matthew R. Durose et al., Dep't of Just., NCJ 207846, Bureau of Justice Statistics, Family Violence Statistics: Including Statistics on Strangers and Acquaintances at 2 (2005) available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf; Callie Marie Rennison & Sarah Welchans, U.S. Dep't of Just., NCJ 178247, Bureau of Justice Statistics Special Report: Intimate Partner Violence at 1, 7 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv.pdf.

[8] Citing James Ptacek, Battered Women in the Courtroom: The Power of Judicial Response (1999), (reviewed in Meda Chesney-Lind, James Ptacek, Battered Women in the Courtroom: The Power of Judicial Response, 35 Crime, L. & Soc. Change 363 (2001)).

These statistics and studies show police intervention is absolutely needed. They further show the enforcement of protective orders is working to reduce abuse and violence in family and intimate relationships.

In this case, the victim, Kirby, and Sergeant Whitman, Officer Bowling, and Officer Diekman, did it by the book. The respondent to the Protection Order, Combs, should not be permitted under the law to pursue civil liability from the police where they acted to enforce the Order by entering an apartment to properly seize baby Tyler.

An Ohio Court, upon Kirby's application, issued that Order against Combs. The Order prohibited Combs from having contact with Kirby. The Order also included custody and visitation provisions for Combs and Kirby's child. This was a violent and troubled relationship,[9] like so many others across this country, and the Order was put in place to protect Kirby from Combs, as well as to allow Kirby the opportunity to safely see and raise her child.

The Officers were dispatched to Combs' apartment after the police were called and told that Combs was violating the Domestic Violence Protection Order. To enforce the Order, it is obvious the officers would have

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[9] In addition to Combs perpetrating violence against Kirby, Carpenter also physically assaulted Kirby approximately a year before the incident at issue in this case and Combs' mother repeatedly threatened Kirby in the presence of the Officers, saying she would "kick Kirby's ass if she got her hands on her." (301a-302a)

had to enter Combs' apartment to obtain possession of the baby, whom Combs was refusing to turn over to Kirby.

This Court recently addressed the exact opposite side of this all too common situation in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S.Ct. 2796 (2005). In *Castle Rock*, a domestic violence protective order, similar to the one at issue in this case, was in place between a woman and her estranged husband. Like in this case, the order contained provisions governing the estranged husband's visitation and custody of the couple's three children. *Id.* Also like in this case, the estranged husband refused to comply with the order with respect to the visitation of the children, and the husband took the children at a time prohibited by the order. *Id.*

Like in this case, the mother called the police to report the estranged husband's noncompliance with the domestic violence protection order. *Id.* However, unlike in this case, the Colorado police officers did not respond to the mother's call. *Id.* The estranged husband murdered the couple's three children. *Id.* The mother later pursued due process claims against the police who failed to respond to her call. *Id.*

Although this Court ultimately held that the mother in *Castle Rock* had no viable cause of action there, the Court did offer this statement of caution:

> Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments

> are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.

Id. at 768-69.

In their dissent in *Castle Rock*, Justices Stevens and Ginsburg expanded on this statement from the majority, noting that fifteen states have enacted statutes that mandated arrest for domestic violence offenses, and nineteen states have mandated arrest for domestic restraining order violations. *Id.* at 781.

Ohio is indeed one of the states striving to protect victims of domestic violence, and the children of those couples. Ohio mandates law enforcement to enforce domestic violence protection orders. Ohio Revised Code § 3113.31(F)(4) directs as follows:

> (4) Regardless of whether the petitioner has registered the order or agreement in the county in which the officer's agency has jurisdiction pursuant to division (N) of this section, ***any officer of a law enforcement agency shall enforce a protection order issued or consent agreement approved by any court in this state in accordance with the provisions of the order or agreement, including removing the respondent from the premises, if appropriate.***

(68a)(emphasis added)

One District Court in Ohio has held that Ohio Revised Code § 3113.31 created a property interest that triggers substantive due process rights, reasoning as follows:

> Under O.R.C. § 3113.31, a person may seek a protective order to prevent a relative or household member from abusing other family members. Plaintiff sought and obtained such a protective order in this case. This Court believes that such an order creates a property right which incurs a duty on the part of the government.

Siddle v. City of Cambridge, Ohio, 761 F.Supp. 503, 509 (S.D. Ohio 1991).

Many states, including Ohio, have enacted statutes that may expose police officers to the liability discussed by the majority and the dissent in *Castle Rock*. While the case at bar does not call upon the Court to comment on whether O.R.C. § 3113.31 creates a property interest for Ohio citizens,[10] cases like *Siddle*, and statutes like O.R.C. § 3113.31, do require police officers to enforce domestic violence protection orders.

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[10] After all, the officers in this case were enforcing the Domestic Violence Protection Order, which is entirely different than scenarios such as the ones in *Castle Rock*, or even *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), where police officers' inactivity or non-responsiveness triggered claims for liability.

The officers in this case enforced the Order when baby Tyler was removed from the apartment. Combs admits this by conceding that the "seizure" of Tyler was lawful. It makes no legal or factual sense to interpret the relevant law, as the lower courts have, to conclude the Officers are not entitled to qualified immunity for their act of entering the apartment to seize Tyler. No clear law exists under these facts to deprive the Officers of their entitlement to immunity. And, the lower courts cite none when denying the Officers qualified immunity.

Even in the absence of statutory mandates, police officers face a quandary when responding to domestic violence protective order violation calls, such as the one at issue in this case. For example, if the Officers had arrested Combs in the hallway, and left the baby in the apartment without his custodial parent, and some harm would have come to the baby, Kirby, or even Combs, may have brought suit against the Officers. As the Seventh Circuit noted,

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

As such, the Sixth Circuit's decision in this case places police officers in the position of facing a double-edged sword of potential liability when they are faced with situations such as this one. The police can either

enter the premises to take an infant child into protective custody, and face liability for an unlawful entry, or the police can leave the infant child in the apartment and face potential "snake pit" liability. For this reason, it is asked this Court accept jurisdiction over this case to provide the much-needed direction to the lower courts on this far-reaching legal issue that is in a state of conflict.

II. The Court should take this opportunity, in the context of an excessive force case, to reconcile the inherent conflict created by the directives of *Saucier v. Katz*, which require courts to give deference to police officers on the scene, and the standard for deciding summary judgment motions, which requires courts to construe all self-serving statements in claimants' affidavits in favor of claimants.

The Sixth Circuit, like the District Court, denied qualified immunity to the Officers with respect to Carpenter's claim for the use of alleged excessive force in her arrest. The Sixth Circuit, in affirming the District Court, ruled that Carpenter's self-serving affidavit created questions of fact, and allowed those sworn statements to deprive the Officers of qualified immunity. Because the Officers' perceptions are owed deference, as a matter of law, and because Carpenter's deposition testimony, obtained after she executed her self-serving affidavit, supported the Officers' entitlement to qualified immunity on the excessive force claim, this case exemplifies why the Court should reconcile the current conflict of law.

A. *Graham v. Connor* requires the use of force to be evaluated from the perspective of a reasonable police officer at the scene.

The Sixth Circuit's analysis failed to appreciate this Court's direction in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), and again set forth in *Brosseau v. Haugen*, 543 U.S. 194 (2004). In *Saucier*, the Court explained that qualified immunity analysis extends further than the Fourth Amendment's "reasonableness" standard, set forth in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). In *Graham*, the Court held that the Fourth Amendment "reasonableness" inquiry is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Graham*, 490 U.S. at 395-96. The "reasonableness" of a particular use of force ***must be judged from the perspective of a reasonable officer on the scene***, and "its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." *Id.*

B. *Saucier v. Katz* further directs that qualified immunity analysis allows police officers to make reasonable mistakes as to the legal constraints on the use of force.

In *Saucier*, the Court rejected an argument that the *Graham* test could not be distinguished from the test to determine qualified immunity, and explained the distinction as follows:

The qualified immunity inquiry, on the other hand, has a further dimension. ***The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct.*** It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. ***If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.***

Graham does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances. This reality serves to refute respondent's claimed distinction between excessive force and other Fourth Amendment contexts; in both spheres the law must be elaborated from case to case. ***Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes "hazy border between excessive and acceptable force,"*** *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (C.A.11 2000), ***and to ensure that before they***

> ***are subjected to suit, officers are on notice their conduct is unlawful.***

Saucier, 533 U.S. at 205-206 (emphasis added).

As such, both *Graham* and *Saucier*, and *Brosseau*, direct that courts must give deference to a reasonable police officer at the scene in deciding issues of qualified immunity, as well as the "reasonableness" inquiry of the Fourth Amendment.

C. The Court needs to review this case in order to provide courts guidance in how to apply *Saucier*, and *Graham*, to motions for summary judgment, when a self-serving affidavit is submitted solely for the purpose of manufacturing a question of fact.

In the case at bar, the lower courts have ignored the above-mentioned aspect of qualified immunity as set forth in *Saucier*. The rationale for ignoring this aspect of qualified immunity analysis can perhaps be gleaned from the standard for deciding summary judgment motions, which was recently described as follows:

> As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury, and respondent's version of events (unsurprisingly) differs substantially from Scott's version. When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the

> [summary judgment] motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam); *Saucier*, supra, at 201, 121 S.Ct. 2151. ***In qualified immunity cases, this usually means adopting (as the Court of Appeals did here) the plaintiff's version of the facts.***

Scott v. Harris, 127 S.Ct. 1769, 1774-75, 167 L.Ed.2d 686 (2007)(emphasis added).

The inherent conflict this creates with *Saucier* and *Graham* becomes apparent in the case at bar. How can a court give deference to police officers on the scene when, at the summary judgment phase, courts must construe facts in favor of the non-moving party, which will be the claimant in most cases? Under such circumstances, a claimant may overcome summary judgment by simply submitting self-serving statements in virtually any claim for alleged excessive force. As the Court noted in *Saucier*, this would undermine the goal of qualified immunity, which is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Saucier*, 533 U.S. at 202.

As is often the case in claims such as this, Carpenter submitted an affidavit riddled with inflammatory words, such as "crush," "forcibly," and "slam." The Sixth Circuit cites these words at the end of its decision, concluding that questions of fact prevented application of qualified immunity for the Officers. In placing such emphasis on Carpenter's self-serving statements in her affidavit, the Sixth Circuit does not even mention what, if any, deference was

given to the officers, who were dispatched to an emotionally-charged scene to arrest Combs for violating the Domestic Violence Protection Order in place.

The *Scott* case started to reconcile the conflict when the Court dealt with a case in which the arrestee's version of the events was contradicted by a video of the events in question. *Scott*, 127 S.Ct. 1769. The Court noted as follows:

> ***When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.***
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. ***The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape***.

Id. at 1776 (emphasis added).

The *Scott* case is similar to the case at bar, where Carpenter's affidavit statements are disputed by her own deposition testimony on the key points at issue. For instance, Carpenter's affidavit states she "told the

police they were wrong" for taking Combs' child (144a), while she later testified at her deposition that she never told the police they were wrong to take the child. (277a) Carpenter's affidavit states Officer Bowling was "trying to trip her," but she chose not to include this as a fact that occurred during her arrest when cross-examined at her deposition. Carpenter's affidavit states she was "forcibly" pushed into a van, and "made a dent in the van with my body," but she denied that the van was dented during her deposition. (318a) Further, Carpenter could have, but did not, use the same inflammatory words that appear in her affidavit when giving her deposition testimony.[11]

The lower courts should not have been constrained to accept Carpenter's version of the incident, as set forth in Carpenter's self-serving affidavit, and at the same time, ignore her very different deposition testimony. Instead, lower courts should be permitted to analyze claims for alleged excessive use of force from the perspective of the officers on the scene, as *Saucier* and *Graham* direct.

If this legal standard is not further clarified for lower courts, the doctrine of qualified immunity will indeed be stripped of all meaning by the filing of self-serving affidavits, sworn by plaintiffs and witness who support plaintiffs' cause, to overcome their testimony given in depositions. And, the deference that should

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[11] In considering the affidavit testimony, which conflicted with Carpenter's deposition testimony, the Sixth Circuit disregarded its own precedent, which holds that such affidavits may not be considered for summary judgment purposes. *Yanovich v. Zimmer Austin*, 255 Fed. Appx. 957, 961 (6th Cir. 2007).

be granted to the on-scene police officers will lose all meaning as well.

D. Deference should be given to the police officers on the scene, and not to a self-serving affidavit sworn by the arrestee, used to manufacture a question of fact.

In this case, the Officers were dispatched in response to Combs' violation of a Domestic Violence Protection Order. In addition to Combs and the baby, many of Combs' family members were present in his apartment at the time of his arrest, including his sister, Carpenter, and Combs' mother, and girlfriend. It is undisputed in the record that Combs and his family members were upset and crying, and threats were being made by Combs' family members against Kirby, who was waiting in the parking lot for the Officers to bring her baby to her. This was undeniably an emotionally-charged atmosphere. The actions of Sergeant Whitman and Officers Bowling and Diekman must be judged from the perspective of a reasonable officer responding to the scene of an emotionally-charged atmosphere in the context of a violation of a domestic violence protection order, and given proper deference. The Sixth Circuit, like all other federal courts, is in need of law on this issue because without identifying clearly established law, it wrongly decided the Officers' entitlement to qualified immunity from suit.

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham*, 490 U.S. at 395-96 (citing *Terry*

v. Ohio, 392 U.S. 1, 20-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Because "police officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation," the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. *Saucier*, 533 U.S. at 205 (citing *Graham*, supra, at 397).

It is undisputed in the record that Carpenter was upset during Combs' arrest, and especially when the baby was taken from her and given to Kirby. It is undisputed that Officer Bowling took Carpenter aside before her arrest, and warned her she needed to calm down because she was not helping the situation. Deference is owed to the Officers' account because they face these situations every day. While Carpenter and her family had more police involvement than most, they were emotionally-charged and did, by way of Carpenter's self-serving affidavit, trump up the events to defeat an otherwise proper summary judgment motion seeking an award of qualified immunity for the Officers.

It is further undisputed that the Officers did all they could to diffuse the emotionally-charged situation, including allowing Carpenter to leave the scene to look for paperwork that Carpenter falsely claimed would exonerate Combs, taking the time to speak to Combs' attorney, and even calling Children's Services to make sure it was okay to give custody of the child to Kirby. None of this pacified Carpenter, who remained upset and intentionally followed the Officers to the parking

lot, where it is undisputed that Carpenter yelled at Kirby, triggering Carpenter's arrest.

The Court should take this case to make it clear to all lower federal courts that the law requires this case, and all cases like it, to be analyzed under Rule 56 from this perspective, rather than the self-serving affidavit of Carpenter, which is riddled with, at best, statements unsupported in the record, and at worst, outright lies. Such an affidavit is created for the sole and exclusive purpose of defeating an otherwise proper request for qualified immunity for the Officers. A rule of law clarifying the standard used in immunity challenges is needed. Under such analysis, the Sixth Circuit's decision should be reversed on the basis that the Officers committed no constitutional violation during the arrest of Carpenter.

CONCLUSION

For all of the foregoing reasons, this Court should grant Sergeant Whitman, Officer Bowling and Officer Diekman's petition and reverse the Sixth Circuit's decision.

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